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Supreme Court of the United States.

No. 312.

WILLIAM H. COOK, APPELLANT,

vs.

CHARLES LILLO.

Appeal from the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR COMPLAINANT AND APPELLEE.

C. E. SCHMIDT,
E. J. GAYARRÉ,
of Counsel.

L. Graham & Son, print, 327 Gravier st.

Supreme Court of the United States.

No. 212.

WILLIAM H. COOK, APPELLANT,

vs.

CHARLES LILLO.

Appeal from the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR COMPLAINANT AND APPELLEE.

On the 11th January, 1877, the complainant, Charles Lillo, filed his bill in this case for the enforcement of a mortgage claim for five thousand dollars ($5000), and interest thereon at the rate of eight per cent. per annum from the 29th March, 1875, until paid, besides attorney's fees and costs (R. pp. 1 to 4).

The defendant, for answer to the bill, alleged that the consideration for the mortgage was Confederate notes, or bills of credit, issued in the name of the Confederate States, during the late rebellion, to enable them to carry on war with the United States. That the original holders of the mortgage were R. & A. Soulié, who aided in the circulation of said notes or currency with the intention of thereby sustaining the said Confederate States. That at the date of the transaction between defendant and the said R. & A. Soulié, said notes were depreciated so as to be some sixty per cent. or more below par. That said notes were bills of credit prohibited by the Constitution of the United States, and were securities prohib-

ited by the code, constitution, and statutes of the State of Louisiana.

That if plaintiff has any interest in the notes and mortgage described in the bill, he acquired the same after the notes had matured, and consequently they are subject to the original equities against B. & A. Soulié.

That at the maturity of the mortgage notes sued on, the value of Confederate notes as compared with gold coin, was from thirty-five to forty dollars of bills for one dollar of coin, and that it was the contract of parties dealing in them, that payment should be made in the same currency. That both respondent and B. & A. Soulié resided at the time of the transaction in New Orleans, and were under the dominion of the Confederate power.

That respondent has made payments to B. & A. Soulié which have really extinguished the mortgage notes now sued on; but that the said B & A. Soulié have illegally appropriated the money received from him to usurious and illegal charges of interest, sometimes amounting to ten and twelve per cent., contrary to the contract between the parties and to the laws of the State.

And finally, respondent pleads the prescription (or statute of limitations) of ten, five, and three years, in bar of plaintiff's claim.—See Answer, Rec. pp. 9 to 11.

The facts of this case, as shown by the evidence, are as follows:

On the 15th January, 1861, prior to the issue of any Confederate notes or currency, the defendant Cook effected a loan from Samuel S. Green of a sum of ten thousand dollars, furnishing to the lender his two promissory notes of five thousand dollars each, payable one year after date, with eventual interest of 8 per cent. per annum, to secure the payment of which he granted a mortgage on the real property, situated in New Orleans, described in the bill (Rec. pp. 5 and 6, and pp. 20 and 21).

Some two months after the maturity of these two notes of $5000 each, to-wit: on the 24th March, 1862, the defendant, Cook, paid them by giving his own check for the amount

thereof on one of the banks of the City of New Orleans, which at that time, he thinks, were paying out Confederate notes (Rec. pp. 20, 21).

On the 26th March, 1862 (Rec. pp. 4 to 7), the defendant executed an authentic act of mortgage before P. C. Carvallier, a Notary Public in New Orleans, whereby he acknowledged himself indebted to Bernard Soulié in the full sum of $11,100, lawful money by the said B. Soulié to him loaned, and in liquidation thereof, furnished ten promissory notes, made by him to his own order and by him endorsed, all bearing interest, in case of non-payment at maturity, at the rate of eight per cent. per annum thereafter until paid.

Five of said notes were made payable one year after date, viz.:

One for	$ 157.50
"	110.00
"	165.00
"	82.50
"	55.00

The other five, made payable two years after date, were:

One for	2,637.50
"	2,110.00
"	3,165.00
"	1,582.50
"	1,055.00
Total	$11,100.00

The said Cook bound himself further, in case of judicial proceedings for the recovery of the amount of said notes, or of any part thereof, to pay, at the rate of five per cent. on the amount sued for, the fees of the attorney at law who might be employed to institute such proceedings—a stipulation usually inserted in mortgage acts in Louisiana (see the case of Rice & Foster vs. Brusa, 11 La. Annual Rep., p. 34).

And in order to secure the payment of the said notes, together with all eventual interest, attorney's fees and costs,

the said Cook, by the said act, specially mortgaged in favor of the said Bernard Soulié, who accepted the same for himself and to inure to the use of any subsequent holder or holders of the said notes, the real property, situated in the city of New Orleans, described in the complainant's bill.

Cook had thus furnished Soulié five notes, payable at one year from March 26th, 1862, and five, payable in two years from that date, all of which were secured by the same mortgage.

At the time this suit was brought, in January, 1877, all of the said notes had been paid by the defendant, with the exception of two of those originally made payable in two years from their date, viz.: one for $2110, and one for $3165, which notes, by partial payments, had been reduced in principal respectively to $2000 and $3000, on which the interest accrued up to the 26th March, 1875, had been paid.

We shall now consider the testimony adduced in the case in connection with the several defences presented to the complainant's bill.

Inasmuch as Lillo, the complainant, only acquired the ownership of the notes after their maturity, we concede, at the outset, that the defendant is entitled to urge against him the same equities he could have presented against the original holder, Bernard Soulié, or his firm of B. & A. Soulié, who were really acting in the matter as the agents of Eulalie and Louise Soulié (Testimony of Henry Bacon, Rec. pp. 25, 26, and 27 and p. 36).

First. It is alleged that the consideration received by the defendant from the original holders, for the mortgage notes sued on, was Confederate notes, which the said holders were engaged in circulating as currency with the intent of sustaining the Confederate States; that said Confederate notes had at the time depreciated considerably below par, and that it was the contract of parties dealing in them, that payment should be made in the same currency.

What is the testimony on this subject of the defendant himself?

He admits that in January, 1861, before the issue of any Confederate notes, he borrowed $10,000 in lawful money, giving

his notes thereafter payable in January, 1862, and secured by mortgage on his real property (Rec. p. 20).

That on the 24th March, 1862, he paid the amount of said notes by his own check on one of the local banks, which he admits were only paying out Confederate notes (Rec. p. 21); and his witnesses *Montreuy* (R. p. 21) and *Castan* (R. p. 22) show that the banks were paying out no other currency.

Being asked what was the motive of his conduct in paying off the $10,000 mortgage, and, almost immediately afterwards, contracting a new indebtedness for about the same amount, he answers (Rec. p. 21):

"Because I did not wish to pay ten per cent., as I was on those two notes (of 1861), when I could obtain money at *five and a half*; four and a half was worth saving, and that was the reason. I was informed by Soulié that on the 20th I could obtain a loan on five and a half. I afterwards paid this $10,000 that I obtained at ten per cent., *and obtained the loan from Soulié at five and a half*, thereby saving four and a half; *that was my object.*

Inasmuch as the defendant had for years been paying interest in lawful money on the two notes sued on, an attempt was here made by his Counsel to show that he had only done this under the threat of judicial proceedings. The defendant's answers show with what result. He was asked:

"Under what circumstances were these extensions made on these two notes in suit?"

A. "There were no circumstances at all about it that I know of."

Q. "Were you threatened with foreclosure, or anything of that kind?" A. "No, sir."

The defendant had already stated that he had received the net amount of the loan from Soulié in a check on the Bank of Louisiana, and when asked what he had done with it, had answered that he had, so far as he recollects, deposited it to his own credit in the branch of the Louisiana State Bank (Record pp. 18 and 19). He did not pretend that he had not received the full benefit of the amount stipulated. He nowhere asserts that he lost a dollar by the transaction, although full opportu-

nity was allowed him to make a statement to that effect. The conclusion is, therefore, irresistible, that he could not truthfully have denied having received full consideration for his notes.

And he derives no assistance from the only witness adduced to show the relative value of Confederate notes and gold, and U. S. treasury notes and gold; for that witness, *H. R. Giffney*, says (R., p. 22): "I found certain rates for gold taken from the statements furnished by Judson & Co., then bankers, to be *seventy per cent.* premium over Confederate currency (this appears to relate to March, 1862, when the notes sued on were issued); I was also requested to find the price of gold on March 25th, 1864 (about the time of the maturity of the notes); taken from the papers' financial report of greenbacks, they were selling then at *one hundred and sixty-five.*"

From this witness' statement, then, Confederate notes were selling at $170 for $100 in gold, and when the defendant's notes were to be paid, in March, 1864, U. S. treasury notes or greenbacks were selling at $165 for $100 in gold, so that if defendant had paid his notes at maturity in legal tender notes, he would have paid very little more than the value of the consideration he had received. In no event could the defendant pretend that *gold* was the standard of value to which other currencies were to be reduced to ascertain their value. *Bissell* vs. *Heyward*, 6 Otto, 587.

But the real intention, the understanding of the parties at the time of the transaction, the interpretation which they themselves put upon their contract, as shown by the manner in which it was partially executed, must control all other considerations in determining the extent of the liability of the defendant.

As said by this Court in the Confederate note cases, 19 Wall. 559:

"The understanding of the parties may be shown from the nature of the transaction and the attendant circumstances, as satisfactorily as from the language used. A contract, for example, to pay $50 for a night's lodging at a house of public entertainment, where similar accom-

modations was usually afforded for one-twentieth of that sum in coin, accompanied by proof of a corresponding depreciation of Confederate notes, would leave little doubt that the parties had Confederate money in contemplation when the contract was made. In *Thevington vs. Smith* the land was sold for the nominal sum of $45,000, when its value in coin was only $3000, a most persuasive fact to the conclusion that Confederate notes were alone intended in the original transaction. So, on the other hand, contracts made payable out of the Confederate States, or at distant periods, *such as may be supposed as desired as investments of moneys*, or given upon a consideration of gold, would, in the absence of other circumstances, *justify the inference that the parties contemplated payment in the legal currency of the country.*

"In the present case the intention of the railroad company that the principal of its bonds should be paid in lawful money instead of Confederate notes, *may justly be inferred*, we think, from the nature of the contracts, particularly the long period before they were to mature."

In the case at bar, however, we are not left to mere inferences. We have the defendant's own declaration under oath of his understanding of the contract.

Being asked by his counsel (Rec. p. 23):

Q. "When that debt was contracted, in what currency did you contemplate paying it?"

A. "*I did not have any contemplated currency.*"

Q. Did you expect to pay it in greenbacks?"

A. "That never entered my mind. *I expected to pay it in the currency going when it was due;* I could not sit down at that time and think how I should pay in any notes."

Here, then, is the unqualified admission of the defendant that he intended paying these notes in such currency as would be in use and circulation at New Orleans at the time they became due.

And is it to be believed that when B. Soulé invested $12,000 of the money of his two sisters, Eulalie and Louise, at the low rate of interest of 5½ per cent. per annum, in this mortgage, as clearly shown by the documents B and C, offered in evidence

by the defendant, and found at pp. 28 and 29 of the Record, he contemplated payment in any other money than such as would be in use and current in New Orleans at the date fixed for the payment of the debt?

Besides, has not the defendant paid all the eight other notes sued and the interest thereon in United States currency, no matter how depreciated it was at times? Has he not heretofore paid part of the principal and of the interest of the very notes sued on, in like currency?

How can he, then, in the face of his own understanding of the contract, and of his own conduct, based upon that understanding, for a period of some fifteen years antecedent to this suit, seriously ask a Court of Justice at this late day, to disregard his own interpretation of, and action under, that contract, so as to enable him to repudiate his most solemn obligations?

Yet, his threat to have his unpaid promissory notes annulled by the decree of a State Court, induced the giving the advice to Eulalie and Louise Soulié, residing in Paris, France, to sell the said notes to an alien; which sale was promptly effected at probably a considerable sacrifice, when, in reality, such a transfer was entirely unnecessary for the protection of said original holders, since the Supreme Court of the State, in July, 1877, refused to recognize the doctrine of the illegality of Confederate note consideration in ordinary or business transactions, and declared their accord with the now settled jurisprudence of this Court on the subject, as laid down in *Thorington vs. Smith*, 8 Wall 1, and subsequent cases. *Lay vs. succession of O'Neil*, 29 La. Annual Rep., 729, 730.

While the defendant does not deny in his answer the plaintiff's ownership of the notes, still, he says therein, that he does not admit that plaintiff has any interest in the said notes, and insists that if he has any such interest, he acquired the same long after they became due, and is bound by all of the defences which the respondent can present against them. This we take to be nothing more, nor less, than an averment that the defendant is entitled to set up the same equities against the plaintiff that he could have urged against the first holder, which we have already distinctly admitted.

As to the charge that B. Sonlié, or his firm of B. & A. Sonlié, were engaged in aiding in the circulation of Confederate currency, with the intent of sustaining the government of the Confederate States, it is clear that this averment was made simply to bring the case within the exception stated in the case of *Thorington vs. Smith* to the general rule that contracts based on Confederate note consideration, effected between parties residing within the Confederate States, could be enforced in the Courts of the United States. Not an iota of evidence, however, has been adduced in support of the charge.

Having thus fully considered the first branch of the defence, we pass to the next one.

Secondly: The defendant says that he has paid a much larger sum than was due on the ten notes secured by the mortgage of the 28th March, 1863; that the payments by him made have really extinguished all the said notes, but that B. & A. Sonlié, original holders, or agents of the original holders of the notes, have failed duly or legally to apply the payments on said notes, having made usurious and illegal charges of interest, and having sometimes appropriated the money received from defendant to the discharge of interest claimed by them at the rate of ten and twelve per cent., contrary to the written contract and to the laws of the State of Louisiana.

The plea of usury thus set up is quite untenable under the laws of Louisiana.

The defendant has, in Document E (Rec. p. 29), furnished us with a statement showing the amounts of interest and principal paid by him on the notes from the year 1863 to the year 1875 inclusively, giving the date of the payments. This document E will best be understood when read in connection with Documents B and C on the preceding page of the Record.

The defendant has further offered a number of checks and receipts to show the payments, both in principal and interest, by him made at different times to B. & A. Sonlié.

The defendant shows that he has paid eight of the ten notes secured by the same mortgage, and that, as alleged by plaintiff, on the remaining two notes, viz: those for $2210 and $2205

respectively, he has made partial payments which have reduced the same in principal, the one to $2000, the other to $3000, on which balances interest is due since the 29th March, 1875.

The defendant shows and admits that about the last of March, 1875, he made the last payment of interest on the notes (See doc. N., Rec. p. 29), and that the acknowledgments of payment of interest, written or subscribed by him across the face and back of the notes are correct—Rec. pp. 7 and 8 and p. 20.

This suit was instituted in January, 1877, that is to say, upwards of one year and nine months after the last payment of interest. The defendant, on the 10th March, 1877, in his answer, first made his claim for usurious interest paid. No such claim can be entertained in Louisiana twelve months after the alleged payment.

In 1831, the question of the right to maintain an action for the repayment of usurious interest, was first considered by the Supreme Court of Louisiana, in the case of Perrilat vs. Pasch, 2 La. Rep., 428.

In that case the defendant had excepted to the plaintiff's suit, on the ground, among others, "that the money had been paid in compliance with a natural obligation, and could not be recovered back."

The consideration of this ground of exception the Court thought presented some difficulty.

"The 1751st article of the Louisiana Code," said the Court, "divides natural obligations into four kinds, and under the first head classes those "which are invalid for the want of certain forms, or for some reason of general policy, but which are not, in themselves, unnatural or unjust."

"The 1752d declares that although natural obligations cannot be enforced by an action, yet among their effects one is, that no suit will lie to recover what has been paid, or given in compliance with a natural obligation.

"By the 2284th, it is provided, that the payment from which we might have been relieved by an exception that would extinguish the debt, affords ground for claiming restitution.

"But the article which follows that just cited, limits this exception to those which would extinguish all natural obligations.

"Were it not for the definition given to the natural obligation, in the 1751st article, we should have had great difficulty in deciding this cause."

The Court then goes on elaborately to discuss the question whether there was a natural obligation (under the statutory definition of such an obligation) to pay a rate of interest which one has agreed to, although in excess of that allowed by the law, and the court concludes as follows:

"We are of opinion that the prohibition in relation to taking more than a certain rate of interest for money, is founded upon motives of public policy, and not because the contract is immoral. In other words, that it is not *malum in se*, but *malum prohibitum*, and that therefore the exception must be sustained."

Here, then, the Supreme court of Louisiana distinctly laid down the doctrine that a contract by which usurious interest is exacted and paid, is in compliance with a natural obligation, and cannot be recovered back; that such a contract is not *malum in se*, but *malum prohibitum*.

This doctrine we find reaffirmed and steadily adhered to through a long series of decisions. See *Millaudon* v. *Arnaud*, 4 L., 542; *Peydras* v. *Turpeau*, 14 L., 34 (in which case the Court held that where usurious or compound interest had been paid, the party cannot recover it back, or *have it deducted, when sued for the debt*); *Merchants' Bank* v. *Gore*, 15 L. 378 (the Court holding in this case that a party could not recover back usurious interest or discount, which he had voluntarily paid, *either by direct action or exception*); *Kenner & Co.'s syndic* vs. *Holliday*, 19 L. 155; *Cone* vs. *Rowley*, 12 Rob., 373; *Reid* vs. *Duncan*, 1 Annual Rep., 265, 268.

Thus stood the jurisprudence of the State on this subject when, on the 19th February, 1844, a law was passed, in the nature of an enabling statute, by the 2d section of which it was declared: "That if any person hereafter shall pay on any contract entered into after the passage of this act, a higher rate of interest than the above (eight per cent.) as dis-

count or otherwise; the same may be sued for and recovered *within twelve months from the time of such payment.*"—Session Acts of 1844, p. 15.

Here, then, was express legislation authorizing the recovery of usurious interest, provided it was judicially claimed *within twelve months from its payment;* after that lapse of time, no recovery of such interest was authorized.

This law of 1844 was maintained in the revisory legislation of 1855 (Acts of 1855, p. 352), and in the Code of 1870, Art. 2924.

In a case which arose after the passage of the statute of 1844, that of *Barrett* vs. *Chaler*, 2 Ann., 876, the Supreme Court of Louisiana said: "The deceased, as we have seen, paid this usurious interest, by consenting to an imputation of the proceeds of sales of a crop of cotton to its extinction. The act, however, of 1844, s. 2 (Sess. Acts, p. 15) permits sums thus paid to be sued for and recovered, within twelve months from the time of the payment. *The defendant filed his plea of usury within the time limited*, and, under the provisions of the statute, the charge for commissions and interest for advances in the first account, must be rejected."

Had not the plea of usury been filed by the defendant within the twelve months, it is evident the Court would not have sustained it.

So in the case of *Mrs. M. Cox vs. Ellen McIntyre*, 6 Ann., 470, it was again distinctly held, that a party who had enjoined the enforcement of a claim on a mortgage note could not be allowed, after the lapse of twelve months, to set up the plea of usury in opposition to the mortgagee's claim, nor to have usurious interest paid imputed to the principal of her debt.

Again, in the case of *Weaver vs. Maillet*, 15 Ann., 385, the defendant's right to the repetition of usurious interest paid, was held to be limited to one year under the statute of 1855 (Sess. Acts, p. 352), which, as we have seen, is a mere re-enactment of the Act of 1844.

We have thus, we believe, conclusively demonstrated that

the defendant's plea of usury is entirely untenable under the law and jurisprudence of Louisiana, where the contract was entered into and was to be executed.

It is idle, then, for the appellant to declaim against usurious practices. Whatever may be the reputation or penalties with which such practices are visited elsewhere, we have shown what are the views entertained, as to the policy or morality of contracts affected with usury, by the highest court of Louisiana, and this tribunal will not revise a decision of the Circuit Court rendered in conformity with the doctrine of the State courts on such a subject. *Delmas vs. Insurance Co.*, 14 Wall. 661, and cases there referred to.

Thirdly and lastly, we come to the plea of prescription or of the statute of limitations.

The defendant has pleaded the prescription of *ten*, of *five*, and of *three* years in bar of plaintiff's claim.

This plea was not even referred to on the argument before the Circuit Court. We hardly think any attempt will be made to show the applicability of any of the prescriptions pleaded, to the plaintiff's case.

The prescription of *three years*—La. Code art. 3538 (3503)—could only be set up as regards *money lent*, if no note had been furnished.

That of *five* years applies to promissory notes. But prescription is interrupted, whenever the debtor acknowledges the debt against which it was running. So, a promise to pay or partial payment before prescription acquired, being an acknowledgment of the debt, has the same effect. La. Code, art. 3520 (3486): 3 L., 262; 8 L., 283; 12 L., 455; 1 R., 556; 6 R. 419; 8 R., 145; 9 R. 18, 113; 3 A., 552; 4 A., 569.

Now, the defendant admits that all the credits and extensions marked on the face and across the back of the two notes sued on, are correct (Rec. p. 20). See the credits on the notes (Rec. pp. 7 and 8). They matured in March, 1864, and these credits, most of which are signed by the defendant, show payments of interest steadily, and almost annually, up to 1875, when, besides interest, a part of the principal was paid.

As to the prescription of *ten* years, it could only have applied to the reinscription of the mortgage in the books of the Recorder of Mortgages for the parish of Orleans, had not such reinscription (La. Code art, 3369 (3333) been effected before the lapse of ten years from the date of the original inscription. But here, the first inscription was made on the 27th March, 1862, and the reinscription on the 26th March, 1872—See certificate of Darcantel, Rec, p. 7.—Hence, the reinscription was made before the expiration of the ten years. But even if it had been made only after that delay, third parties only, holding subsequent mortgages, could have availed themselves of such neglect, not the mortgagor, as against whom the mortgage exists unimpaired by want of registry. *Bonin* vs. *Durand*, 2 Annual Rep., 776; 10 Ann., 591; 11 Ann., 399

We have thus examined *seriatim* the defences presented to the complainant's bill, viz.:

1. The alleged illegality and insufficiency of the consideration received;

2. The plea of usury;

3. The statute of limitation or prescription.

We have shown that none of said defences can be maintained under the evidence and the law of Louisiana.

We therefore pray for the affirmance of the decree of the Circuit Court.

All of which is respectfully submitted,

C. B. SCHMIDT,

T. J. SEMMES,

of Counsel.

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UNITED STATES OF AMERICA.

In the Supreme Court of United States.

No. 6.—ORIGINAL.

EX-PARTE: THE DES MOINES AND MINNEAPOLIS RAILROAD COMPANY, A CORPORATION OF IOWA.

Petition for a writ of mandamus to the Circuit Court of the United States for the District of Iowa, Northern Division.

To the Honorable the Supreme Court of the United States.

The Des Moines and Minneapolis Railroad Company respectfully states that at and on all the days and times herein mentioned it was, and now is, a corporation created and existing under and by virtue of the laws of the State of Iowa, and a citizen of the State of Iowa; that heretofore, to wit, on the third day of September, A. D. 1880, it filed in the office of the clerk of the Circuit Court of the United States for the District of Iowa, a petition in a civil suit against John B. Alley, then and now a citizen and an "inhabitant" of the Commonwealth of Massachusetts, claiming therein a judgment against the said John B. Alley for the sum of ninety-nine thousand six hundred and sixteen dollars and five cents; that said petition, after the usual form of prayer for judgment, and in conformity with

the practice and pleading then existing in the courts of record in the State of Iowa, asked for a writ of attachment against the lands and tenements, goods and chattels, rights and credits of the said John B. Alley, upon the ground that the said defendant, John B. Alley, was a non-resident of the State of Iowa (district of Iowa); that your petitioner in so doing relied upon section 915 of the Revised Statutes of the United States, and the laws of Iowa relating to attachments, which by said section 915 were adopted and made the laws of the United States for said district of Iowa, and that provision of section 2 of an act of Congress entitled "An act providing the times and places of holding the Circuit Court of the United States in the District of Iowa, and for other purposes," approved June 4, 1880, which reads as follows, to wit: "Where the defendant is a non-resident of the district, suit may be brought in any division, where property, or the defendant, is found;" that said petition was duly verified, and security furnished in the sum of three hundred thousand dollars; that such verification and security were in due form, were duly approved, and similar to what was required by the Code of Iowa in all cases where suits are brought in the courts of the State of Iowa; that the remedies by attachment which were provided by the Code of Iowa, prior to the passage or enactment of section 915 of the Revised Statutes of the United States, and which ever since such enactment have been and now are in force therein, gave to your petitioner, the plaintiff in said suit, the remedy by attachment against the property of the said John B. Alley, which he there sought, and in the manner in which your petitioner sought such remedy; that, among others, the following sections of the Code of Iowa relating to attachments were, by said section 915 of the Revised Statutes of the United States, adopted and made the law of the United States for the district of Iowa, for the government and direction of the circuit court of the United States therein to be held, in any and all cases where any plaintiff in a civil suit should

seek a remedy by attachment against the property of the defendant therein, to wit:

SECTION 2,949.

"The plaintiff in a civil action may cause any property of the defendant which is not exempt from execution to be attached at the commencement or during the progress of the proceedings by pursuing the course hereinafter prescribed."

SECTION 2,951.

"The petition which asks an attachment must in all cases be sworn to. It must state:"

* * * * * * *

"2. That he," the defendant, "is a non-resident of the state."

SECTION 2,618.

"Service may be made by publication when an affidavit is filed that personal service cannot be made on the defendant within this state in either of the following cases:"

1st. * * * * * * *

2d. * * * * * * *

3d. * * * * * * *

4th. * * * * * * *

5th. "In actions brought against a non-resident of this state or a foreign corporation, having in this state property or debts owing to such defendant, sought to be taken by any of the provisional remedies or to be appropriated in any way."

6th. * * * * * * *

7th. * * * * * * *

8th. * * * * * * *

SECTION 2,621.

"Actual personal service of notice either within or without the state supersedes the necessity of publication."

And your petitioner further shows that upon the filing of such petition, duly sworn to as aforesaid, and upon the filing and approval of said security, the clerk of said circuit court issued in said cause, in usual form, the ordinary

summons in a civil action, and also a writ of attachment against the property of the said John B. Alley, directed to the marshal of said district, commanding him to attach the lands and tenements, goods and chattels, rights and credits of the said John B. Alley (except such as is exempt from execution) wherever the same might be found in said district, or so much thereof as might be necessary to satisfy said sum of ninety-nine thousand six hundred and sixteen $\frac{95}{100}$ dollars, and delivered said summons and writ to the said marshal for service; that thereupon the said marshal made return upon said writ of attachment that the same came into his hands on the 3d day of September, 1880, and that he served the same on the 4th day of September, 1880, at 8 o'clock A. M., by levying upon certain shares of stock in certain named railroad corporations and in a corporation owning certain lands, the property of the said John B. Alley within said district; and he returned the said summons "not served, the within named John B. Alley not being found in my district."

And your petitioner further says that thereupon and thereafter it filed an affidavit in said suit showing that personal service could not be made on the defendant therein within the said district (State) of Iowa; that the action was brought against a non-resident of the (State) district of Iowa, and that the defendant had property in the state sought to be taken by attachment, and asking an order of service by publication, or an order for personal service upon the defendant, either within or without the (state) district; that afterwards said motion for such order coming on for hearing, to wit, at the November term, 1880, of said Circuit Court of the United States for the Northern Division of Iowa, the defendant entered a special plea to the jurisdiction of the court, the gravamen of said plea being that the defendant was not an inhabitant of said district, and had not been found therein, and moved a dismissal of said suit, and for an order dissolving the attachment therein; that the said circuit court took said matter under advise-

ment, and thereafter, to wit, on the 22d day of January, 1881, sustained said plea to the jurisdiction, and ordered and adjudged that the plaintiff's suit be dismissed, and the attachment therein dissolved, which order and judgment was duly entered of record, and to all of which the plaintiff duly excepted and gave notice of this proceeding to review said action of said circuit court.

And your petitioner says the said circuit court erred in dismissing said suit and in ordering said attachment dissolved; that said circuit court had jurisdiction of said cause and should have granted the order for service asked, and proceeded, upon such service being made, to hear and determine such suit upon the merits; that your petitioner is greatly aggrieved by the action of said circuit court in the premises, and will be greatly injured and damaged, and its legal rights greatly hindered and destroyed, unless said circuit court be required to restore said cause to its docket and set aside the orders dismissing said suit and dissolving said attachment.

Wherefore your petitioner prays a peremptory writ of *mandamus*, commanding the said Circuit Court of the United States for the District of Iowa, Northern Division, to set aside its orders dismissing said suit and dissolving said attachment, to restore said cause to its place on the docket of said court, to grant the order of service asked for, and to proceed to hear said cause further and upon such issues as may be framed therein.

THE DES MOINES AND MINNEAPOLIS
RAILROAD COMPANY,
By WM. M. JONES,
Its General Solicitor.
JOSEPH H. BLAIR,
Of Counsel.

UNITED STATES OF AMERICA,
DISTRICT OF IOWA, CENTRAL DIVISION. } *ss.*

Wm. M. Jones, being first duly sworn, on his oath says, he is one of the directors, a member of the executive com-

mittee of the board of directors, and the general solicitor of the Des Moines and Minneapolis Railroad Company, the petitioner named in the foregoing petition; that he has heard read the said petition, and knows the contents thereof; that the same is true to his own knowledge except as therein stated on information and belief, and as to those matters he believes the same to be true.

W. M. JONES.

Subscribed and sworn to before me, this 9th day of March, A. D. 1881.

[SEAL.] EDWARD R. MASON,

Clerk U. S. Circuit Court, Dist. of Iowa.